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No. 07-

IN THE

Supreme Court of the United States

ANDREW J. ORKIN, F. MARK ORKIN
and SARAH-ROSE JOSEPHA ADLER,

Petitioners,

v.

ELIZABETH TAYLOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether three 1998 federal statutes intended to address the plight of Holocaust victims and to facilitate the restitution of property taken from them during the Nazi era create an implied private right of action for the recovery of works of art by their heirs.

2. Whether the consistent U.S. public policy since 1947, mandating the restitution of such property without regard to the rights of intervening purchasers or statutes of limitations, requires uniform national rules governing actions to recover such property.

3. Whether and under what circumstances a Rule 12(b)(6) motion to dismiss a facially valid complaint on the grounds of the statute of limitations requires a hearing to determine whether a plaintiff exercised sufficient due diligence in investigating the facts before commencing suit.

PARTIES TO THE PROCEEDING

The petitioners are Andrew J. Orkin, F. Mark Orkin and Sarah-Rose Josepha Adler. A. Heinrich Zille was a plaintiff in the District Court and an appellant in the Court of Appeals. However, he died on May 8, 2006 and his estate is being served as a respondent. Respondent is Elizabeth Taylor.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Andrew J. Orkin, F. Mark Orkin and Sarah-Rose Josepha Adler respectfully petition for a writ of certiorari to review a judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

On May 18, 2007, the U.S. Court of Appeals for the Ninth Circuit entered a judgment affirming an order of the U.S. District Court for the Central District of California, entered April 4, 2005, which granted respondent's motion to dismiss the complaint pursuant to F.R.Civ.P. 12(b)(6).

The District Court opinion is not reported in the Federal Supplement, but is at 2005 WL 4658511. The Court of Appeals opinion is at 487 F.3d 734. Both opinions are reprinted in full in the appendix to this petition, at 1a-28a.[1]

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(a) in that a final judgment was rendered by a United States Court of Appeals.

This petition is timely, being filed within 90 days of the entry of final judgment of the Court of Appeals on May 18, 2007, pursuant to this Court's Rule 13 subd. 1. The judgment is thus within this Court's jurisdiction and is reviewable by writ of certiorari.

The District Court and the Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1332, in that all of the petitioners are foreign citizens, the respondent is a citizen of the

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[1] References herein to pages denoted "a" are to pages in the appendix.

State of California and the value of the painting in controversy is well in excess of $75,000.

Jurisdiction was also asserted pursuant to 28 U.S.C. § 1331, in that some of petitioners' claims were brought pursuant to three 1998 statutes: the Holocaust Victims Redress Act, Pub. L. 105-158, 112 Stat. 15, the Nazi War Crimes Disclosure Act, Pub. L. 105-567, 114 Stat. 2865, and the United States Holocaust Assets Commission Act, Pub. L. 105-186, 112 Stat. 611. Neither the Court of Appeals nor the District Court addressed whether federal question jurisdiction existed pursuant to these statutes.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the three above-cited statutes, two California statutes and Military Government Law No. 59 are reproduced in the appendix at 29a-35a, 35a-39a and 40a-44a respectively.

STATEMENT OF THE CASE

In 1889, Vincent van Gogh entered the asylum of Saint-Paul-de-Mausole near Saint-Rémy-de-Provence. In the late summer of that year, he painted *Vue de l'Asile et de la Chapelle de Saint-Rémy*. Less than a year later, he had killed himself. After his death, the painting passed to his brother Theo's widow. The German art dealer Paul Cassirer, an early promoter of the works of van Gogh and other post-impressionists, purchased the painting in 1906 or 1907.

Petitioners' great-grandmother Margarethe Mauthner (1863-1947) lived in Berlin. She was Jewish, a noted translator and advocate of the arts, and a friend of Cassirer's. Around 1905, she authored a German translation of van Gogh's letters. In 1906 or 1907, she purchased the painting from Cassirer. Two editions of the leading and presumptively correct van

Gogh *catalogues raisonné*, published in 1939 and 1970 by a Belgian lawyer and van Gogh scholar named Dr. J.B. de la Faille, establish that Mauthner was the owner of the painting well into the late 1930's, perhaps as late as 1938 or 1939.

From 1933 until the end of World War II in 1945, Adolf Hitler's Nazi regime engaged in the systematic dispossession of Jews, first of everything they owned and then *en masse* of their very lives. This campaign included the confiscation and forced sale of works of art in Germany and then throughout Europe. The enactment in 1938 of the Ordinance for the Attachment of the Property of the People's and State's Enemies, and the Ordinance for the Employment of Jewish Property, among many other such ordinances, gave Nazi officials the authority to seize, or to force the sale to Aryans of, the property of Jews, including works of art, under color of law.

It has been estimated that during those years more than 600,000 works of art were confiscated or otherwise taken from Jews by the Nazi regime. According to a post-war estimate by the U.S. Government, this policy resulted in the looting of an astonishing one-fifth of all Western art in Europe. Subsequent investigations have estimated the number as even higher, between one-fourth and one-third.

As conditions in Germany became intolerable, Mauthner finally fled Germany for South Africa in March 1939 with her small family group (her daughter, son-in-law and two grandchildren), having by then lost her livelihood and most of her property due to the Nazi policies of coercion, including the family home, the painting and other works of art.

Mauthner eked out her remaining years as a refugee in Johannesburg, caring for her ailing daughter, Edith Pinkuss, who predeceased her. Mauthner died at the age of 84 in 1947. Mauthner's son-in-law and immediate heir, Adolph Israel Orgler (petitioners' grandfather), died in 1964 in Johannesburg at the age of 86 after a long illness. Mauthner and Orgler's immediate heirs, Else Orkin née Orgler (petitioners' mother) and Irmgard Zille née Orgler, were young adults when they left

Germany. Irmgard Zille lived just long enough to participate in the initiation of this litigation below.

In 1947, the U.S. Military Government in Germany enacted Military Government Law No. 59 ("MGL 59")(40a-44a). This law required the restitution of all looted property to their former German Jewish owners, and deemed that all property losses they suffered between 1933 and 1945 were the direct result of Nazi persecution.

In 1946, the U.S. Treasury Department, in response to pressure from the U.S. art industry and auction houses, had revoked a directive which had prohibited the importing of artworks from Nazi-occupied countries. It issued a circular letter to U.S. museums, auction houses and dealers, saying that although the legal restriction on such importation had been lifted, precautions against acquiring such artworks were still essential. In 1951, the U.S. State Department issued a second circular letter to the U.S. art industry reiterating this warning. It is believed that Taylor's father, as a professional art dealer in Los Angeles and New York during these years, was aware of both letters.

In so doing, the U.S. Government underscored the importance to the art trade of accounting for provenances for European art after the war. However, one unfortunate side effect of these principled U.S.-led policies was to encourage the concealment and alteration of these provenances for decades to come, by many participants in the trade.

In the early 1960's, the estate of Alfred Wolf, who then possessed the painting, engaged Sotheby's in London to auction a number of Impressionist and post-Impressionist paintings, including *Vue de l'Asile et de la Chapelle de Saint-Rémy*. With respondent Elizabeth Taylor's father, an experienced London art collector and dealer, acting as her advisor and agent, Taylor had begun collecting European art in the early 1950's, mostly works by French Impressionists including Degas, Renoir, Pissarro, Monet and Cassatt. She had long wanted to acquire a van Gogh. While living in London, Taylor learned that the

painting would be sold at a Sotheby's auction in April 1963. She authorized her father to bid for her at the auction, and he succeeded in purchasing it on her behalf for £92,000. It is worth millions today.

Taylor's purchase received some publicity at the time, and the 1970 de la Faille *catalogue raisonné* lists her as the most recent owner. In 1990, Taylor offered the painting for sale through Christie's auction house in London, which prepared a sales brochure for her, but it did not sell.

The bibliography section in the Christie's/Taylor 1990 auction brochure referenced the 1928 and 1939 editions of de la Faille's *catalogues raisonné.* However, while the 1939 edition establishes Mauthner's ownership into the late 1930's, that crucial detail was not disclosed in the brochure, which says only that Mauthner "kept the picture until at least 1928" Thus, the fact of Mauthner's 1939 ownership during the Nazi era was obscured from the public.

The authoritative 1970 edition of the de la Faille *catalogue raisonné* (prepared at the behest of the Dutch government by a committee of leading van Gogh scholars) records the immediate next owner of the painting (after Mauthner in 1938 or 1939) as Alfred Wolf, a businessman who left Germany for Switzerland (which was a center for the re-selling of Nazi gold and art) in 1934 and then went to South America in the early 1940's.

However, the 1963 Sotheby's brochure (produced when Taylor purchased the painting) attempted to account for the ownership of the painting between 1928 and 1945 by adding two apparently fictitious (according to the 1939 *catalogue raisonné*) owners between Mauthner and Wolf. The brochure says that ownership passed from Mauthner back to Paul

Cassirer, then to a Marcel Goldschmidt, and only then to Alfred Wolf. But Cassirer had committed suicide in 1926.[2]

This "error" was partially repeated in the 1990 Christie's brochure:

> Cassirer sold the picture in May 1907 to Margarete Mauthner and her Berlin publisher husband, Eduard. Margarete Mauthner had, only the year before, translated and produced for Bruno Cassirer a German edition of selected van Gogh letters...the Mauthners were close friends of the Cassirer cousins, Paul and Bruno. They purchased at this period at least three other van Gogh pictures...and two drawings...from Paul Cassirer and were thus among the first and most important collectors and patrons of van Gogh's work in Germany. They kept the picture until at least 1928 when Cassirer again exhibited it in Berlin. Subsequently it passed to the dealer Marcel Goldschmit in Frankfurt and the Munich-Stuttgart collector, Alfred Wolf.

In 1998, Congress enacted, and the President signed into law, three statutes to provide redress to victims of Nazi persecution: the Holocaust Victims Redress Act, Pub.L. No. 105-158, 112 Stat. 15 (1998), the Nazi War Crimes Disclosure Act of 1998, Pub.L. No. 105-167, 114 Stat. 2865 (1998), and the United States Holocaust Assets Commission Act of 1998, Pub.L. No. 105-186, 112 Stat. 611 (1998).

The petitioners are middle-class siblings who now reside in Canada and South Africa, and were all born after the war in the 1940's and early 1950's. None has any special art knowledge or expertise. Although they and their parents were

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[2] http://www-sul.stanford.edu/depts/spc/xml/m0287.xml (last visited August 15, 2007).

vaguely aware that Mauthner had been a collector of European art, including that of van Gogh, they–like thousands of other Holocaust-era victims and heirs only now pressing restitution claims in the United States and elsewhere–did not learn that they had a possible claim to the painting until after 2000. In particular, it was the enactment of these statutes, and the remedies they made available, that first impelled them to investigate whether Mauthner may have lost some of her art collection due to Nazi persecution and whether they had a legal right to recover the van Gogh painting.

Had the petitioners relied solely upon the seemingly authoritative information provided in Sotheby's, Christie's and Taylor's promotional sales brochures in 1963 or 1990, they would have been grossly misled about Mauthner's ownership of the painting during the Nazi era. They would in fact have reasonably concluded that they had no claim to the painting at all, because Sotheby's, Christie's and Taylor had all asserted, in effect, that Mauthner had freely parted with the painting by 1928, five years before Hitler came to power in 1933.

Only after retaining U.S. counsel, and conducting extensive expert investigation in Europe, South America and the U.S., aided by the 1998 statutes and the machinery they set up, were petitioners finally able to begin to dispel the self-serving fog of incomplete and even false provenance information that has been presented as established fact by various interested parties over the decades, including to the lower courts in this case.

THE PRESENT ACTION

In 2001, petitioners retained a Washington, D.C. law firm to investigate the factual basis for their claim to the painting. Until the investigation was completed in late 2002, they simply did not know, and could not readily have discovered with any reasonable level of due diligence:

(a) that Mauthner was registered in the 1939 edition of a presumptively correct reference work as having owned the painting into the late 1930's in Berlin;

(b) that she had surely lost it as a result of Nazi persecution, including through the presumption of MGL 59;

(c) that Taylor had bought the painting in London in 1963 using her expert art dealer father as her agent;

(d) that there were serious questions as to Taylor's knowledge about the Holocaust-era ownership of the painting when she bought it in 1963, and her status as a good-faith purchaser, including her acceptance of a disclaimer of warranty of title, both by Sotheby's and the seller;

(e) that Taylor's 1990 sales brochure was materially incomplete and misleading; and

(f) that these facts gave petitioners a legal basis to recover the painting in the United States.

In December 2003, petitioners wrote a letter to Taylor, informing her of their claim and requesting the return of the painting. She rejected their demand as untimely, and then, after requesting that they allow her six months to conduct her own investigation, suddenly sued petitioners for a declaratory judgment, seeking to clear her title.

On October 16, 2004, petitioners responded by commencing the present action in the U.S. District Court for the Central District of California, asserting causes of action for specific recovery, replevin, constructive trust, restitution and conversion. They filed an amended complaint on January 11, 2005.

On November 8, 2004,Taylor moved to dismiss the complaint pursuant to F.R.Civ.P. 12(b)(6), alleging that the statute of limitations had expired, that title had conclusively passed to Taylor pursuant to English law six years after she purchased it, that there was no private right of action under the three 1998 statutes, and that a California statute extending through 2010 the statute of limitations for recovery of

Holocaust-looted art (36a-39a) applied only to museums and galleries, not private persons.

In their opposition to the motion, petitioners asserted that the Holocaust Victims Redress Act gave them an implied right of action under *Cort v. Ash*, 422 U.S. 66, 78 (1975), and that equitable principles tolled the statute of limitations. Furthermore, MGL 59 had established a presumption that any works of art in Germany during the Nazi years were stolen and acquired wrongfully, even as against good faith purchasers, and Taylor was not a good-faith purchaser in any event, since she was on notice when she bought the van Gogh that title was at best questionable and at worst fraudulent.

On February 4, 2005, the District Court granted Taylor's motion (and in a separate opinion dated March 27, 2005 denied her declaratory judgment claim), concluding that the state-law claims were time-barred and that the 1998 statutes did not create a private right of action. The District Court ignored petitioners' allegations as to the equities of Taylor's purchase, which cast grave doubt on her claim to be a good-faith purchaser, and whether her unclean hands equitably tolled the statute of limitations.

Petitioners then appealed to the U.S. Court of Appeals for the Ninth Circuit. The Court affirmed the District Court, on the ground that the three statutes did not create a private right of action under *Cort v. Ash*. The Court also held that the petitioners' claims were time-barred, and that under California law, their causes of action accrued when they discovered or reasonably could have discovered their legal claim to, and the location of, the painting. At the latest, said the Court, that would have been in 1990, when Taylor offered it for sale, and at the earliest in 1963 when she bought it at a publicized auction. The Circuit Court did not address petitioners' allegations that Taylor was not a good-faith purchaser, and that they were entitled to an equitable tolling of the statute of limitations.

REASONS FOR GRANTING THE PETITION

1. The applicability of a statute of limitations to bar an otherwise well-pleaded complaint cannot be decided on a Rule 12(b)(6) motion, and the resolution of the many conflicting allegations in this case should have been the subject of a plenary evidentiary hearing. Given the facial validity of the complaint[3], the factual complexity of the statute of limitations defense and the availability of equitable tolling should not have been determined on papers alone.

This Court's recent decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S.___, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) has been highly significant in the lower courts in the less than three months since it was decided.[4] This case affords an opportunity to extend that decision to address the appropriate standards for adjudicating affirmative defenses raised in the context of 12(b)(6) motions, and whether plaintiffs are entitled to evidentiary hearings to adjudicate fact-based affirmative defenses against complaints which unquestionably state claims.

2. There are conflicts among the Circuit Courts as to the proper method for litigating these cases, and when the various statutes of limitations accrue, leading to intolerably inconsistent results. This conflict seriously undermines the strong and long-standing U.S. public policy U.S. public policy that property stolen during the Holocaust should be restituted to its rightful owners, regardless of any statute of limitations defenses.

The issue is of pressing importance, given the advanced age of Holocaust survivors and their heirs. Moreover, in the

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[3] The District Court specifically held that petitioners had stated claims, 2005 WL 4658511 at *3.

[4] It has been cited 457 times by the lower courts, http://writ.lp.findlaw.com/dorf/20070813.html (last visited August 14, 2007).

past decade, claims for recovery of such property have increased greatly. Given the already substantial difficulties of proof in these cases, the Court should extend its ruling in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), and provide guidance to litigants and courts in pursuing and resolving these claims.

3. The Ninth Circuit refused to follow controlling authority from an intermediate California appellate court. Such refusal is grounds for granting the writ, and even for summary reversal.

4. The public policy of the United States, as expressed as recently as the three 1998 statutes, and as early as the 1947 MGL 59, is that persons whose property was stolen or abandoned during the Nazi era are entitled to press claims to recover it, and that their rights to do so are absolute, regardless of the intervening rights of subsequent purchasers. Additionally, in 1986, the U.S. State and Justice Departments, and the U.S. Information Agency, said that a requirement for discovery and due diligence would create a haven for stolen art, and successfully urged the veto of a bill in New York which would have created such a requirement. Thus, the judgment of the Ninth Circuit is in conflict with the long-standing and often-repeated public policy of the United States.

Because of this public policy, there should be uniform procedures for determining such claims brought by private persons. This Court should declare that the 1998 statutes created an implied right of action, and that members of the class of persons identified by the statutes have the right to seek equity and justice for their claims.

POINT I

THE LOWER COURTS IMPROPERLY RESOLVED FACTUAL ISSUES REGARDING THE STATUTE OF LIMITATIONS, LACHES AND EQUITABLE ESTOPPEL WITHOUT A HEARING.

Generally a statute of limitations defense may not be raised in the context of a Rule 12(b)(6) motion unless the untimeliness of the claim appears on the face of the complaint. Otherwise, the plaintiff is entitled to an evidentiary hearing, and if matters outside the complaint are submitted in support of the motion, the Court can treat the motion as one for summary judgment pursuant to Rule 56, after notice to the parties. *Robinson v. Johnson*, 313 F.3d 128 (3rd Cir.1997); *Oaxaca v. Roscoe*, 641 F.2d 386 (5th Cir.1981); *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434 (6th Cir.1988); *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir.1980). *Cf. Jones v. Bock*, 550 U.S.___ at ___, 127 S.Ct. 910 at 920-21 (2007).

But here, the allegations in the complaint did *not* demonstrate on their face that the claims were barred by the statute of limitations. Taylor's motion to dismiss was not directed to the face of the complaint, and it included substantial additional material, including affidavits. The issues were factually complex (and disputed) ones of the statute of limitations, laches and equitable tolling. Under the circumstances, the lower courts should not have dismissed the complaint without a hearing.

There were other procedures which could have been followed other than summary dismissal on the basis of complex and disputed facts. F.R.Civ.P. 12(d) provides for a preliminary hearing when a defendant moves pursuant to 12(b)(6). That would have been one appropriate procedure here, or the District Court could have reserved the issue for trial, preserving petitioners' Seventh Amendment right to a jury; or at the least

it could have proceeded according to the last sentence of Rule 12(b) and treated the motion to dismiss as one for summary judgment, giving the parties time to submit anything admissible on a Rule 56 motion. Instead both lower courts speculated as to the true facts and drew wholly unwarranted conclusions.

In effect, the District Court converted the 12(b)(6) motion to one for summary judgment, without giving the required notice to the parties, and the Court of Appeals approved this improper procedure. *See* Wright & Miller, 5 *Federal Practice & Procedure* § 1277 at 628:

> One objection to permitting the defense of limitations to be raised by motion, even when it appears to be available from a reading of the complaint, however, is that there may be facts tolling the running of the statute, such as by equitable estoppel, that do not appear in the complaint, which means that the motion to dismiss might be premature and simply promote unrewarding motion practice or, what is worse, lead to an improvident termination of the action.

If anything, the District Court and the Court of Appeals should have held that the statute of limitations was subject to equitable tolling, and it had sufficient evidence before it to justify a hearing, especially in a case of such national importance as this one. "Time requirements in lawsuits between private litigants are customarily subject to equitable tolling." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990), *rehearing den.*, 498 U.S. 1075 (quotation marks omitted). "We consider it much more consistent with the overall congressional purpose to apply a traditional equitable tolling principle, aptly suited to the particular facts of this case and nowhere eschewed by Congress, to preserve petitioners' cause of action." *Honda v. Clark*, 386 U.S. 484, 501 (1967) (statute of limitations tolled for Japanese-Americans' suit to recover funds vested under the Trading with the Enemy Act;

public funds not at issue); *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir.1996)(widespread human rights violations during the Marcos era equitably tolled statute of limitations for class action claim under § 1983).

> Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights. *This policy of repose, designed to protect defendants, is frequently outweighed, however, where the interests of justice require vindication of the plaintiff's rights.*

Burnett v. New York Central Railroad Co., 380 U.S. 424, 428-29 (footnote, citations and quotation marks omitted; emphasis added).

POINT II

THE SECOND CIRCUIT CASES DEMONSTRATE THE CORRECT APPROACH, AND THEY CANNOT BE RECONCILED WITH HOLDINGS FROM THE SIXTH, SEVENTH, EIGHTH AND NINTH CIRCUITS.

There have been irreconcilable rulings by the Circuit Courts which have addressed the issue of stolen art. Such

conflicts are a ground for granting the writ, particularly given the need for uniformity of decisions on the issues raised by this case, and the official U.S. policy to foster the restitution of Nazi-looted art. S. Ct. Rule 10(a); *Thompson v. Keohane*, 516 U.S. 99, 106 (1995); *Marks v. U.S.*, 430 U.S. 188, 189 (1982).

The Second Circuit

The New York federal and state cases uniformly hold that the statute of limitations for a replevin claim runs from the date of demand for return of the property and its refusal. The earliest case is *Menzel v. List*, 22 A.D.2d 647, 253 N.Y.S.2d 43 (1st Dept.1964), *on remand* 49 Misc.2d 300, 267 N.Y.S.2d 804 (Sup.Ct.1966), *mod. as to damages*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1967), *rev'd as to modifications*, 24 N.Y.2d 91, 298 N.Y.S.2d 979, 246 N.E.2d 742 (1969). Plaintiff and her deceased husband had bought a Chagall painting in Brussels at auction in 1932. In 1940, the German army invaded Belgium and plaintiff and her husband had fled, leaving the painting. Six years later, they returned home to find a receipt in place of the painting, the German army having removed it as "degenerate art" in 1941. A New York dealer, Klaus Perls, purchased it in 1955 from a Paris art gallery and later sold it to defendant Albert List, and plaintiff sued List in replevin. In 1962, she had noticed a reproduction of the painting in an art book, which identified List as the owner. List in turn sued Perls.

On appeal from denial of a motion to dismiss the action as time-barred, the Appellate Division, First Department said that "with respect to a bona fide purchaser of personal property a demand by the rightful owner is a substantive, rather than a procedural prerequisite to the bringing of an action," (253 N.Y.S.2d at 44) and that the statute of limitations should not begin to run until demand and refusal occurred. After trial, plaintiff was awarded the painting. List was awarded damages against Perls in the amount of the painting's fair market value,

and Perls was left to sue the Paris art gallery from whom he had bought it in 1955.

In ruling on the statute of limitations defense and the argument that the plaintiff had abandoned the painting, the trial court said, "in replevin, as well as in conversion, the cause of action against a person who lawfully comes by a chattel arises, not upon the stealing or the taking, but upon the defendant's refusal to convey the chattel upon demand...The relinquishment here by the Menzels in order to flee for their lives was no more voluntary than the relinquishment of property during a holdup." 267 N.Y.S.2d at 809-10. Furthermore, "provisions of law for the protection of purchasers in good faith which would defeat restitution [of Nazi confiscations] shall be disregarded." (267 N.Y.S.2d at 819; citing MGL § 59).

This interpretation of the statute of limitations was followed in *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150 (2nd Cir.1982), which found *Menzel* controlling. Then in *DeWeerth v. Baldinger*, 836 F.2d 103 (2nd Cir.1987), *cert. den.*, 486 U.S. 1056 (1988), the Second Circuit added a requirement that, although demand and refusal were still required, the owner had to exercise due diligence prior to making a demand.

But three years later, in *Solomon R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311, 569 N.E.2d 426, 567 N.Y.S.2d 623 (1991), the New York Court of Appeals firmly established that the sole prerequisite for a replevin claim in "the New York City art market, where masterpieces command extraordinary prices at auction and illicit dealing in stolen merchandise is an industry all its own," (567 N.Y.S.2d at 624) was a demand and refusal. A laches defense would remain available to a good-faith purchaser against the claim, but there was no requirement on the owner to establish due diligence, the Court saying "we conclude that the Second Circuit [in *DeWeerth*] should not have imposed a duty of reasonable diligence on the owners of stolen art work for purposes of the Statute of Limitations." 567 N.Y.S.2d at 627.

Of great significance to the present case is that, as described in *Lubell*, New York State had specifically rejected the discovery rule. In 1986, the Legislature passed a bill which would have added a discovery rule in replevin actions against certain not-for-profit institutions, and would have required them to give notice that they possessed certain objects in order to commence the running of the statute of limitations. But the Governor vetoed the bill, upon the advice of the U.S. Departments of State and Justice, and the U.S. Information Agency (*see 3 U.S. Agencies Urge Veto of Art-Claim Bill*, New York Times, July 23, 1986, at C15, col. 1). The main reason for the U.S. Government's extraordinary intervention in the enactment of a State statute was that if the bill became law, it would have caused New York to become "a haven for cultural property stolen abroad since such objects [would] be immune from recovery under the limited time periods established by the bill." 567 N.Y.S.2d at 627.

Thus it may be seen from the U.S. urging the Governor to veto the bill that U.S. policy firmly rejected the discovery requirement. To say the least, it is highly unusual for the U.S. Government to take a position on a State law which does not implicate any federal right, and that it did so here demonstrates the importance of the issue on the national level.

The Court of Appeals then said (567 N.Y.S.2d at 628):

> To place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would, we believe, encourage illicit trafficking in stolen art. Three years after the theft, any purchaser, good faith or not, would be able to hold onto stolen art work unless the true owner was able to establish that it had undertaken a reasonable search for the missing art. This shifting of the burden onto the wronged owner is inappropriate. In our opinion, the better rule gives the owner relatively greater protection

> and places the burden of investigating the provenance of a work of art on the potential purchaser.

Following the unequivocal rejection in *Lubell* of a due diligence requirement, the parties in *DeWeerth* returned to court. But ultimately the Second Circuit ruled that the finality of its earlier judgment prevailed over "any injustice DeWeerth believes she has suffered by litigating her case in the federal as opposed to state forum." *DeWeerth v. Baldinger*, 38 F.3d 1266, 1275 (2nd Cir.1994), *cert.den.* 513 U.S. 1001.

The Second Circuit followed the holding of *Lubell,* in *Hoelzer v. City of Stamford*, 933 F.3d 1131 (2nd Cir.1991) and *Golden Buddha Corp. v. Canadian Land Co. of America, N.V.*, (2nd Cir.1991).

The Sixth Circuit

See Charash v. Oberlin College, 14 F.3d 291, (6th Cir.1994)(claim accrues upon discovery of the wrongdoer, but whether plaintiff had constructive notice was a jury question; reversing summary disposition); *Toledo Museum of Art v. Ullin*, 477 F.Supp.2d 802, 806 n.2 (N.D.Ohio 2006)("The Court acknowledges the strong public policy to resolve claims for Nazi-era artwork. However, unlike some states, Ohio law does not contain a special statute of limitations for Nazi-era artwork."); *Detroit Institute of Arts v. Ullin*, 2007 WL 1016996 (E.D.Mich. Mar. 31, 2007). Thus in the Sixth Circuit, the statute of limitations runs from when the claimant should reasonably have discovered the identity of the wrongdoer, but it is an issue of fact.

The Seventh Circuit

In the *Byzantine Mosaics* case, *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*, 917 F.2d 278 (7th Cir.1990), *cert.den.* 502 U.S. 941, the Court awarded possession of mosaics to the Church of

Cyprus. They had been stolen and purchased by a gallery owner in Indiana, but the Court rejected the argument that the suit was untimely, saying that the plaintiffs had exercised due diligence in searching for the mosaics and identifying the defendants. The issue of due diligence was determined after a plenary trial. The Court said, "those who wish to purchase art work on the international market, undoubtedly a ticklish business, are not without means by which to protect themselves. Especially when circumstances are as suspicious as those that faced Peg Goldberg, prospective purchasers would do best to do more than make a few last-minute phone calls. As testified to at trial, in a transaction like this, 'All the red flags are up, all the red lights are on, all the sirens are blaring.'" 917 F.2d at 294.

The Ninth Circuit

By contrast with the rules in the Second, Sixth and Seventh Circuits, the Ninth Circuit held in the case under review that not only are claimants required to exercise due diligence, but that whether they did so or not could be determined summarily, without even a hearing. The holding is contrary to the law regarding the general requirement that the court must hold a hearing on a Rule 12(b)(6) motion based on laches or the statute of limitations, contrary to the protective view of the Second Circuit, which only requires that a claim be brought following a demand and refusal, and contrary to the consistent and reiterated public policy of the U.S. from 1947 to 1998. Its holding cannot be reconciled with those of the other circuits, which either held that claimants are entitled to hearings on the applicability of statutes of limitations and equitable tolling, and, in the case of the Second Circuit (in the world's premier art market), held that there is no discovery requirement at all, the only issue being demand and refusal.

The Second Circuit's approach is clearly the most favorable to claimants, and does the most to foster the public policy of restitution while discouraging the art market's penchant for trafficking in stolen property. It has also been

endorsed by the U.S. Government, as is shown by its intervention with the Governor in 1986.

POINT III

THE NINTH CIRCUIT'S REFUSAL TO FOLLOW *NAFTZGER* IS GROUNDS FOR GRANTING THE PETITION.

Federal courts in diversity cases are bound to follow the decisions of intermediate state appellate courts absent compelling evidence that the highest state court would rule otherwise. *See* Rules of Decision Act, 28 U.S.C. § 1652. Where a Court of Appeals does not do so, its decisions are cause for granting certiorari, and even summary reversal. *See Exxon Company, U.S.A. v. Banque de Paris et des Pays-Bas*, 488 U.S. 920 (1988); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940); *Six Companies of California v. Highway District*, 311 U.S. 180, 188 (1940)("The Circuit Court of Appeals should have followed the decision of the state court ...and its judgment to the contrary is reversed"). As this Court said in *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236-37 (1940):

> [A] federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable...Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.

In the present case, the Ninth Circuit specifically rejected the holding of *Naftzger v. Am. Numismatic Soc'y*, 42 Cal. App.4th 421, 49 Cal. Rptr.2d 784 (2d Dist.1996), *reh. den.* 42 Cal. App.4th 1806B, *pet'n. for review den.* 1996 Cal.LEXIS 2393 (April 25, 1996), which held that an implied discovery rule applied for works of art, and is squarely on point, in favor of *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 751 P.2d 923 (1988).

Naftzger was about stolen rare coins, and it held that Cal. Code Civ. Proc. § 338 (c), which addresses the statute of limitations for "any article of historical, interpretive, scientific, or artistic significance" and which runs from "the discovery of the whereabouts of the article," applied to claims to recover property converted before its enactment in 1983. By contrast, *Jolly* was a tort case involving a woman whose injury arose from her mother's taking DES while pregnant, and who did not even have a cause of action until the California Supreme Court created one a year earlier. It has nothing whatsoever to do with stolen art or property and has no application to the present case.

The Ninth Circuit did not examine, let alone adduce evidence, whether the California Supreme Court would not follow *Naftzger*. Thus the Ninth Circuit erred in applying the clearly inapplicable holding of *Jolly* instead of *Naftzger*'s on point holding. As this Court has frequently held in the above-cited cases and many others, a Circuit Court's refusal to follow controlling state law precedent, even from an intermediate court, is grounds for granting the writ, and even for summary reversal, as in *Exxon, supra*. *See In re Kirkland*, 915 F.2d 1236, 1239 (9th Cir. 1990); *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967)(Douglas, J., dissenting)("we have never suggested that the federal court may ignore a relevant state court decision because it was not entered by the highest state court. Indeed, we have held that the federal court is obligated to follow the decision of a lower state court in the absence of decisions of the State Supreme Court showing that the state law is other than announced by the lower court.")(citations omitted).

POINT IV

THE PUBLIC POLICY EXPRESSED IN THE THREE 1998 STATUTES IS ENFORCEABLE THROUGH AN IMPLIED RIGHT OF ACTION.

The Ninth Circuit rejected petitioners' argument that the three 1998 statutes created an implied right of action, stating:

> The district court properly dismissed the Orkins' federal claims on the ground that the Holocaust Victims Redress Act did not create a private right of action against private art owners. In determining whether a federal statute creates a private right of action, congressional intent is the cornerstone of the analysis. The Supreme Court has established a four-factor test for discerning whether a statute creates a private right of action. *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). Under that test, we must ask: (1) whether the plaintiff is a member of a class that the statute especially intended to benefit, (2) whether the legislature explicitly or implicitly intended to create a private cause of action, (3) whether the general purpose of the statutory scheme would be served by creation of a private right of action, and (4) whether the cause of action is traditionally relegated to state law such that implication of a federal remedy would be inappropriate. The most important inquiry under *Cort* is the second factor: whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one...the *Cort* test itself is focused entirely on intent.

487 F.3d at 738-39, 8a (citations and quotation marks omitted).

But having correctly set forth the *Cort* standard, the Court then failed to apply it, holding that the following provision of the Holocaust Victims Redress Act (§ 202, 112 Stat. at 17-18) was merely precatory and created no private right of action:

> It is the sense of the Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.

But the three acts taken together, combined with the statements of its principal sponsor, and President Clinton when he signed them into law[5], demonstrate clearly that private actions were to be encouraged. For example, according to the House sponsors, James A. Leach, Chairman of the Committee on Banking and Financial Services, and Benjamin A. Gilman, Chairman of the Committee on International Relations, "[o]ur bill underscores the fact that the restitution of these works of art to their rightful owners is required by international law and expresses the sense of Congress that governments should take appropriate action to achieve this objective."

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[5] "[w]e have pressed for the restitution of property and for the full declassification of archives so that confiscated assets can be traced and restored to their rightful owners...[I]t is my hope that this bill will hasten the restitution that they undeniably deserve." 34 Weekly Comp. Pres. Doc. 263 (Feb. 20, 1998).

Chairman Leach held a hearing on June 25, 1997, and heard testimony from two art historians and an attorney. He said:

> Chairman Leach:
> Let me underscore one point. We have two historians and one attorney. I take it there is no doubt in anyone's mind that could prove – a Holocaust victim, for instance – If you could prove as an heir that you once owned a confiscated piece of art, you are entitled to retrieve it today under American and most international law. Is that valid?
> Ms. Nicholas: It depends on which jurisdiction...[6]

Chairman Leach later said, "[b]ut most of all, the [Redress Act] is a reminder the past must never be forgotten...history does not have a statute of limitations...The operative principle is simple: stolen property must be returned. Pillaged art cannot come under a statute of limitations. The rape of Europa must not pass without atonement."[7]

To imply a cause of action under these circumstances need not create any federalism concerns. Federal courts have limited jurisdiction, and petitioners do not argue that an implied cause of action under the 1998 statutes is necessarily a federal one. What is clear, however, is that wherever heirs of Holocaust victims may choose (or be obliged) to litigate, the standards should be identical, and not be dependent upon the vagaries of differing state laws regarding statutes of limitations,

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[6] Excerpts from Record on Appeal ("ER") at 85, 130-31.

[7] ER at 100. The full statement may be found at http://financialservices.house.gov/banking/21298lea.htm (last visited August 15, 2007).

equitable tolling, or requirements for due diligence and discovery vs. demand and refusal.

Unless we are to conclude that all of this Congressional language (which is only the latest manifestation of a consistent and strong U.S. public policy since 1947) is nothing more than a cruel joke on the class of people it purports to protect, paying mere lip service to their plight while letting them fend for themselves if they actually try to enforce their rights, it must be concluded that it means something. Congress created rights in enacting these three statutes, and creating a right means creating a remedy, ever since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803): "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." Holocaust theft and profiteering therefrom is such a violation, and the 1998 redress laws must be construed to furnish a private remedy.

POINT V

THERE IS A STRONG RECENT TREND TOWARD PERMITTING CLAIMANTS OF HOLOCAUST-ERA ARTWORKS TO SEEK TO RECOVER THEM, REGARDLESS OF THE STATUTE OF LIMITATIONS. THE NINTH CIRCUIT'S DECISION IS COUNTER TO THIS TREND AND CONTRADICTS PUBLIC POLICY.

Further proof that the climate is highly favorable to permitting heirs of Holocaust victims to pursue their claims may be found in this Court's decision in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004). While the case addressed the limited question whether the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605, ("FSIA") applied retroactively, the result (and the clear intention) was that an elderly woman was

permitted to pursue her claim to recover six Klimt paintings which had been long ago stolen from her family by the Nazis and which wound up in the Austrian National Museum.[8] As the Ninth Circuit observed in *Alperin v. Vatican Bank*, 410 F.3d 532, 551 (9th Cir.2005), "that the Court allowed the [*Altmann*] case to proceed underscores that courts have a place in deciding Holocaust-era claims concerning looted assets." Yet the same Court ignored its own conclusion when it dismissed petitioners' case.

Holocaust-era claims will *always* involve long delays in asserting rights, by definition. If the holding in this case is allowed to stand, the courts will have *no* role in resolving them, since they will almost always be dismissed on statute of limitations grounds.

Both *Altmann* and *Alperin* implicated the political question doctrine, because relief was sought against foreign governments and entities. If, in the face of the obstacles and difficulties of that doctrine, and the enormous evidentiary problems faced by plaintiffs[9], the courts have nonetheless allowed claims to proceed, *a fortiori* petitioners here should be allowed to proceed in this purely private dispute. This Court took a tremendous step forward in providing a measure of justice to Maria Altmann and to others similarly situated who

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[8] After this Court's decision remanding the case to the District Court, to avoid further delays (not least because of Ms. Altmann's advanced age), the parties agreed to binding arbitration in Austria, and she was eventually awarded ownership of the paintings. Richard Bernstein, *Austrian Panel Backs Return of Klimt Works*, New York Times, January 17, 2006 (§ E, col. 4).

[9] *See In re Austrian and German Bank Holocaust Litigation*, 80 F.Supp.2d 164, 174-75, 177-78 (S.D.N.Y.2000)(noting the complexity, expense, duration and risk of pursuing Holocaust-era claims through litigation), *aff'd sub nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2nd Cir.2001).

pursue claims against foreign governments; private litigants are entitled to no less.

See also United States v. Portrait of Wally, No. 99 Civ. 9940, 2002 U.S. Dist. LEXIS 6445 (S.D.N.Y. Apr. 12, 2002). A painting by Egon Schiele was on display at the Museum of Modern Art in New York, on loan from a museum in Austria. Just as the painting was about to be returned, the United States brought a civil forfeiture proceeding under the National Stolen Property Act , 18 U.S.C. § 2311 *et seq.*, on the ground that the painting was taken from victims of the Holocaust during World War II. The District Court refused to dismiss the case, and the litigation is pending. Thus a criminal statute was deemed to support a civil cause of action.

The pursuit of Holocaust-era claims is a relatively recent phenomenon. *See* Michael L. Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. Rich. L. Rev. 1, 19 (2000), which said that October 1996, when a class action was filed against three Swiss banks, was "the start of the new era of Holocaust-claim litigation." The article goes on to say:

> The filing of such lawsuits only now–over one-half century after the events took place–is astounding. In the history of American litigation, a class of cases has never appeared in which so much time had passed between the wrongful act and the filing of a lawsuit. In contrast to the recent flood of lawsuits, only ten suits were filed in American courts from 1945 to 1995 stemming from damages suffered during the Holocaust era. The filing of such suits at the close of the twentieth century presents the last opportunity for the elderly survivors of the Holocaust to have their grievances heard in a court of law. Since the Holocaust took place in Europe, courts in European countries may appear on first blush to

> be the logical choice for such Holocaust-era suits. However, as with almost all transnational litigation, the highly-developed and expansive system of justice in this country suggests that the United States remains the best forum for the disposition of such claims. It is a tribute to the U.S. system of justice that our courts can handle claims that originated over fifty years ago in another part of the world. Long established principles of judicial jurisdiction, choice of law, equity, our independent judiciary, the American system of jury trials, and American-style discovery, make the United States the most attractive (and, in most cases, the only) forum in the world where Holocaust-era claims can be heard today.
> 34 U. Rich. L. Rev. at 7-9 (footnotes omitted).

The literature on this subject is large. *See generally* Michael L. Bazyler, *Holocaust Justice: The Battle for Restitution in America's Courts* (2003), ch. 5; Walter V. Robinson, *An Ignominious Legacy: Evidence Grows of Plundered Art in U.S.*, Boston Globe, Apr. 5, 1997, at Al ("growing evidence that the vibrant US market contains a greater number of plundered art works from World War II than anyone had suspected."), *quoting* Elisabeth des Portes, Secretary General of the International Council of Museums: "the art market is the only sector of economic life in which one runs a 90 percent risk of receiving stolen goods;" Wissbroecker, *Six Klimts, A Picasso & A Schiele: Recent Litigation Attempts to Recover Nazi Stolen Art*, 14 DePaul-LCA J. Art & Ent. Law & Policy 399 (2004); Yonover, *The "Last Prisoners of War": Unrestituted Nazi-Looted Art*, 6 J.L. & Soc. Challenges 81 (2004)(concluding that U.S. courts tend to favor restitution); Stephanie Cuba, *Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi Looted*

Art, 17 Cardozo Arts & Ent. L.J. 447, 471 (1999); Kaye, *Looted Art: What Can and Should be Done*, 20 Cardozo L. Rev. 657 (1998); McFarland-Taylor, *Tracking Stolen Artworks on the Internet: A New Standard for Due Diligence*, 16 J. Marshall J. Computer & Info. L. 937 (1998)(need for a uniform standard of due diligence, because courts apply different standards).

This Court should recognize this truly astonishing phenomenon and it should provide guidance to the Nation's courts as to how these difficult but absolutely essential cases can be uniformly, fairly and equitably adjudicated. It is a moral imperative for our Nation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
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